



cullings is the newsletter of
**Cullen – the Employment
Law Firm**

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Measure twice, cut once

Dismissing an employee because of serious misconduct often appears to be an open and shut case. However, employers should always remember the importance of having a proper process. Taking a bit of extra time can protect employers from paying substantial awards to aggrieved employees.

The Christchurch carpenter

Matthew O'Connell was a full-time carpenter at Consortium Construction Limited (CCL). In December 2010 CCL was reinforcing a building which had been damaged in the September earthquake. Scaffolding was erected to carry out the work.

Smoking up a storm

One Thursday afternoon while working on the third level of the scaffolding, the site foreman Jonathan Small detected a smell of cannabis. With him were Mr O'Connell and two other workers. Mr Small identified that the cannabis smell was coming from Mr O'Connell and then ordered him to "put it out".

Later that evening Mr Small reported the incident to CCL's development manager Danny Whiting who in turn consulted CCL's lawyer. Mr Whiting said that his lawyer had told him it was justifiable for him to do what he wanted to do. Mr Whiting wanted to dismiss Mr O'Connell and went to the worksite on Friday afternoon to do just that.

Mr Whiting told Mr O'Connell that he had been smoking cannabis on site and that his employment would end. Mr O'Connell demanded to know who had said he had been smoking cannabis but Mr Whiting refused to identify the source. Mr O'Connell then stormed off and was heard to say he would "clean out" the company.

The drug test

Shortly afterwards Mr Whiting discussed with Mr O'Connell the option of keeping his job provided he take a drug test to prove the absence of any cannabis in his system. Despite this, Mr Whiting considered that he had already

dismissed Mr O'Connell. As for Mr O'Connell, he thought that he would be dismissed if he failed to take the drug test.

Mr O'Connell sought advice and discovered his employer could not force him to take a drug test. He spoke with Mr Whiting on Saturday and said that he would not take the test.

Monday morning

Mr O'Connell turned up for work on Monday morning and asked Mr Small if he still had a job. Mr Small called Mr Whiting to find out. Mr Whiting came to the site and gave Mr O'Connell a letter confirming the dismissal he had made the previous Friday.

Mr O'Connell raised a personal grievance and sought compensation for lost remuneration and for distress.

The Authority

The Authority determined that Mr Whiting had failed to provide Mr O'Connell with an opportunity to respond to the allegation made against him. Mr O'Connell was neither told of the source of the allegation, nor given opportunity to refute or explain the allegation. This unfair process rendered Mr O'Connell's dismissal unjustifiable and entitled him to an award of remedies.

Mr O'Connell's contribution

Fortunately for CCL, Mr O'Connell was not entirely blameless. The Authority was satisfied that Mr O'Connell had in fact smoked cannabis. The two other workers on site had recognised the distinctive smell of marijuana and at the time Mr O'Connell replied that he had accidentally rolled a bud into his tobacco. As a result, the award was reduced by 50%.

Remedies

Mr O'Connell was awarded \$6,760 compensation for lost wages, \$6,000 for distress and \$1,000 for CCL breaching the employment agreement. CCL had deducted \$432.79 for money owed for tools, but had failed to gain Mr O'Connell's written authority to do so.

Conclusion

Employers only get one opportunity to properly execute a disciplinary process leading to dismissal and it is important to make sure it is done properly. Employers should keep in mind the following considerations:

- procedural fairness requires giving appropriate notice of the disciplinary meeting – the employee should be told:
 - that the nature of the meeting is for disciplinary purposes to discuss allegations of serious misconduct made against the employee,
 - that the meeting could result in the summary dismissal of the employee, and
 - that the employee has the right to have a support person present;
- as serious as an allegation may be, employers should not predetermine their decision before putting the allegation to the employee; and
- employers should be prepared to provide relevant information about the allegation – this may include who made the allegation and others who have corroborated the claim.

Had CCL taken the time to provide a fair opportunity for Mr O'Connell to respond to the allegation then his dismissal would likely have been entirely of his own making and not have been so costly for CCL. To borrow a phrase from carpenters' parlance: better to measure twice, and cut once.

Panel for External Legal Services to Government

Cullen – The Employment Law Firm is one of only eleven law firms appointed to the Panel for External Legal Services to Government to provide employment law advice to government (and all of their associated entities) throughout New Zealand.

What CAN a fair and reasonable employer do? – Case studies of the new test of justification LUNCHTIME SEMINAR — 4 SEPTEMBER 2012

Last year the test of justification, in section 103A of the Employment Relations Act 2000, was amended. The new test includes mandatory elements of procedural fairness and changed the threshold from what a fair and reasonable employer 'would' do to what it 'could' do.

The seminar will look at how the new test is being applied by the Employment Relations Authority and the Employment Court. In particular, this seminar will look at case studies of successful and unsuccessful disadvantage and dismissal cases.

The aim of the seminar is to provide employers, managers and HR advisors guidance on how the new test is working, and may work, in practice.

Charles McGuinness, Senior Associate, and **Sarah Cates**, Solicitor, from **Cullen – The Employment Law Firm**, will be presenting this seminar which is designed to give practical and sound advice.

Issues covered in the seminar will include:

- Former section 103A
- New section 103A
- Guidance on changes from the Employment Court
- Successful dismissal claims
- Unsuccessful dismissal claims
- Successful disadvantage claims
- Unsuccessful disadvantage claims

Date: Tuesday, 4 September 2012

Time: 12:00pm - 1:30pm

Location: NZIM Central, Level 7, Lumley House
3-11 Hunter Street, Wellington

Price: Members – Free
Non Members – \$17.39 plus GST

Enrol: www.nzimcentral.co.nz
or call NZIM toll free 0800 800 NZIM